

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
GTE Telephone Operating Companies)	
GTOC Tariff FCC No. 1)	CC Docket No. 98-79
GTOC Trans. No. 1148)	
)	
BellSouth Telecommunications, Inc.,)	
Tariff FCC No. 1 Access Service)	CC Docket No. 98-161
BellSouth Trans. No. 476)	
)	
Pacific Bell Telephone Company)	
Pacific Bell Tariff FCC No. 128)	CC Docket No. 98-103
Pacific Trans. No. 1986)	
)	
To: Competitive Pricing Division)	

**OPPOSITION TO DIRECT CASES
 OF FLORIDA DIGITAL NETWORK, INC.**

Florida Digital Network, Inc. ("Florida Digital"), by its undersigned counsel, pursuant to applicable Orders in the above-referenced proceedings,¹ submits this opposition to the direct cases filed by GTE Telephone Operating Companies ("GTE"), BellSouth Telecommunications, Inc. ("BellSouth"), and Pacific Bell Telephone Company ("Pacific Bell"). Florida Digital opposes the direct cases, and asks that the Commission reject the proposed ADSL tariffs because the

¹ In re GTE Transmittal No. 1148, CC Docket No. 98-79, *Order Designating Issues for Investigation*, DA 98-1667 (rel. Aug. 20, 1998)[hereinafter *GTE Order*]; In re BellSouth Transmittal No. 476, CC Docket No. 98-161, *Order Suspending Tariff and Designating Issues for Investigation*, DA 98-1734 (rel. Sep. 1, 1998)[hereinafter *BellSouth Order*]; In re Pacific Transmittal No. 1986, *Order Designating Issues for Investigation*, DA 98-1772 (rel. Sep. 2, 1998)[hereinafter *Pacific Order*].

Commission has failed to meet its obligation to assure that the rates, terms and conditions of GTE's, BellSouth's, and Pacific Bell's proposed services are just and reasonable.

Sections 201 and 202 of the Communications Act require that the rates, terms, and conditions of a carrier's proposed interstate tariff be just and reasonable. Under Section 204(a)(1) of the Communications Act, the Commission may suspend a tariff for up to five months and initiate an investigation of the lawfulness of the proposed tariff. The Commission will suspend and investigate a tariff if a substantial question of lawfulness is raised. The Commission must conclude any such an investigation within five months of the date the tariff becomes effective.² Thus, under this statutory framework, the Commission is required to evaluate proposed tariffs to determine whether the rates, terms, and conditions proposed by the carrier are just and reasonable under the standards of Sections 201-205 of the Act, suspend and investigate the tariff if a substantial question of lawfulness is raised, and then conclude the investigation within five months.

Assuming that the Commission determines that these ADSL tariffs may be filed at the Commission,³ Florida Digital is concerned that the Commission has disregarded the statutory standards for tariff review and investigations in this case. Numerous petitions to suspend and investigate all three tariffs were filed raising a number of serious issues. For example, one party

² 47 U.S.C. Sec. 204(a)(2)(A).

³ Several Petitions to Reject the tariffs raise serious questions as to whether the proposed service is exchange access at all. GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Trans. No. 1148, *Petition to Reject, or to Suspend and Investigate* of Focal Communications, Inc. and ICG Communications, Inc. at 2, CC Docket No. 98-79 (May 22, 1998); BellSouth Telecommunications, Inc., Tariff FCC No. 1 Access Service, BellSouth Trans. No. 476, *Petition to Reject, or to Suspend and Investigate* of Hyperion Communications, et. al at 2, CC Docket No. 98-161 (Aug. 25, 1998).

conducted a comparison of GTE's prices for unbundled network elements and the proposed prices for DSL that shows that the DSL prices are substantially below cost.⁴ This raises a host of pricing issues concerning whether GTE's rates are cost justified and what is the appropriate allocation of loop costs between DSL and services (interstate and intrastate) to which those costs are currently allocated.⁵ Assuring that prices are just and reasonable is a key responsibility of the Commission under Sections 201-205. Another party pointed out that the tariff provides GTE an opportunity to discriminate in the provision of the service by limiting the availability of the consumer DSL modems needed to receive the service.⁶

The Bureau's designation orders, however, failed to address these and other serious issues raised in petitions to suspend and investigate in that the Bureau designated for investigation only the single issue of whether GTE's, BellSouth's, Pacific Bell's proposed services are jurisdictionally interstate.⁷ At a minimum, the Bureau was obligated to address and explain why the issues raised in the petitions did not warrant investigation. Moreover, Florida Digital does not believe that the current record is sufficient for the Commission to now resolve these issues in favor of GTE, BellSouth, and Pacific Bell, given that the Bureau has failed, for example, to obtain the cost data that

⁴ *Petition to Reject, or to Suspend and Investigate* of NorthPoint Communications, Inc. at 2-3, CC Docket No. 98-161 (Aug. 25, 1998).

⁵ The Commission has yet to resolve similar issues concerning allocation of loop costs between telephone service and video costs. In re Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services, CC Docket No. 96-112, *Notice of Proposed Rulemaking*, FCC 96-214 (rel. May 10, 1996).

⁶ *Petition to Suspend and Investigate* of MCI at 7, CC Docket No. 98-79 (May 22, 1998).

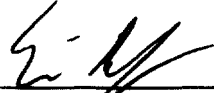
⁷ *GTE Order* para.12; *BellSouth Order* para.10; *Pacific Order* para.10.

could justify the proposed rates. Nor has the Commission obtained a record that would permit it to determine how the costs of the loop should be appropriately allocated between each of the ILEC's alleged interstate service and local services. While the Commission has some discretion as to what issues to designate for investigation, it would be an abuse of that discretion for the Commission to fail to consider issues that go to the heart of the Act during the initial tariff review and investigation process. Florida Digital believes that the structure for tariff review established in the Act envisions that the Commission will review the tariff, examine substantial questions of lawfulness, and conclude its investigation of all such issues within, not after, the five months statutory deadline. DSL is a new service that many competitive LECs are attempting to provide to consumers and businesses. These efforts can be substantially undercut if the Commission permits carriers to file and place in effect tariffs which may not meet key standards under the Act. This would also undercut the goals of the 1996 Act of creating a competitive environment for the provision of telecommunications. Florida Digital is concerned that the Commission has ignored its obligations under Sections 201-205 of the Act in a rush to turn this case into a vehicle to make a statement concerning the jurisdictional nature of Internet traffic.

For many of the reasons identified in the numerous Petitions to Reject in this case, Florida Digital agrees with those Petitioners that these tariffs should not have been filed at the Commission at all. Assuming that the Commission nonetheless concludes that these tariffs should be entertained by the Commission, it should nonetheless now determine that they are unlawful, and reject them, based on the pricing, discrimination and other issues raised in the initial petitions but ignored by the

Bureau. This is the only remedy to the failure to conduct a more thorough investigation as required under the Act based on the matters raised in the initial petitions to suspend and investigate.

Respectfully submitted,



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Dated: September 18, 1998

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CERTIFICATE OF SERVICE

I, Michael W. Fleming, hereby certify that on September 18, 1998 a copy of the foregoing "OPPOSITION TO DIRECT CASES OF FLORIDA DIGITAL NETWORK, INC." was sent by First Class United States Mail, postage prepaid, to the following:

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